FILED
United States Court of Appeals
Tenth Circuit

October 11, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DONTE EARL GRIFFIN,

Defendant - Appellant.

No. 22-6126
(D.C. No. 5:20-CR-00235-D-1)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **HARTZ**, **KELLY**, and **MATHESON**, Circuit Judges.

Defendant-Appellant Donte Earl Griffin was convicted in a bench trial of the assimilated offense of indecent exposure. 18 U.S.C. § 13(a); Okla. Stat. tit. 21, § 1021(A)(1). He was sentenced to a year and a day imprisonment consecutive to the sentence he was already serving, and three years' supervised release. On appeal, he argues that (1) the evidence was insufficient to show that the exposure was willful and (2) the district court erred in imposing a special condition of supervised release prohibiting him from accessing pornography. The government concedes error regarding the special condition. Our

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

jurisdiction arises under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), and we affirm the conviction and sentence, except we vacate the challenged special condition.

Background

In February 2020, Mr. Griffin was an inmate at the Federal Transfer Center in Oklahoma City. While sitting on a rail in a common area, Mr. Griffin masturbated for about an hour with his penis partially concealed under his T-shirt. The events were captured on video. Two female corrections officers (one a registered nurse) testified that Mr. Griffin moved his T-shirt and exposed himself. 3 R. 20, 22, 24, 37, 46–47. Before that, Mr. Griffin had been staring at one of the officers through her office door. 3 R. 18–19, 69. One of the officers called Mr. Griffin out, but Mr. Griffin did not comply and walked back to his cell. Once in the cell, Mr. Griffin refused to let that officer shut the cell door. 3 R. 26–27. The district court denied Mr. Griffin's motion for judgment of acquittal and entered findings of fact and conclusions of law, Fed. R. Crim. P. 23(c), and the judgment. 3 R. 67–75; 1 R. 40–54.

Discussion

A. Sufficiency of the Evidence

We review a sufficiency challenge de novo and consider the evidence and its inferences in the light most favorable to the government. United States v. Serrato, 742 F.3d 461, 472 (10th Cir. 2014). Our task is to determine whether

any rational trier of fact could find the elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318–19 (1979). In evaluating sufficiency of the evidence, we view the evidence and its collective inferences as a whole. United States v. Hooks, 780 F.2d 1526, 1532 (10th Cir. 1986).

Under Oklahoma law, indecent exposure requires proof that the defendant (1) willfully and knowingly, (2) in a lewd manner, (3) exposed his person or genitals, (4) in a public place or in a place where other persons could be offended or annoyed. Okla. Stat. tit. 21, § 1021(A)(1). The only element of indecent exposure that Mr. Griffin challenges is whether he acted willfully and knowingly. Aplt. Br. at 2, 17–19. He contends that his exposure was accidental because the T-shirt he was using to conceal his activity slipped out of his hand. Aplt. Br. at 2. He reminds us that he continually pulled his T-shirt down and did so when informed that he was exposed. Aplt. Br. at 17–18.

The Oklahoma criminal statute defines willfully and knowingly. Willfully "implies simply a purpose or willingness to commit the act or the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage." Okla. Stat. tit. 21, § 92. Knowingly "imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission." Okla. Stat. tit. 21, § 96. Willfully and knowingly are

equivalent. Fairchild v. State, 998 P.2d 611, 620 (Okla. Crim. App. 1999), as corrected on denial of reh'g, (Okla. Crim. App. 2000).

The district court's findings of fact are supported by testimonial and video evidence.[1] The district court found the correctional officers who testified "completely credible." While the evidence of guilt must be substantial, there is no requirement that it exclude every theory except guilt. United States v. MacKay, 715 F.3d 807, 812 (10th Cir. 2013). The district court sitting as the trier of fact was free to reject the characterization of the evidence supplied by Mr. Griffin. Merely because Mr. Griffin made some effort to conceal his activity and sought to do so after his exposure was detected does not require a finding that his conduct was accidental or inadvertent. See Ellington v. State, 462 P.2d 322, 324 (Okla. Crim. App. 1969) (noting that in exposure cases where the evidence conflicts and is capable of different inferences, the trier of fact weighs the evidence and determines the facts, not the appellate court). The trial court found that the exposure was knowing and willful based on the nature of the activity, the inmate area in which it occurred, and Mr. Griffin's failure to comply with orders when confronted. 3 R. 72–73.

Mr. Griffin relies on McKinley v. State, 244 P. 208, 208 (Okla. Crim. App.

[1] The parties dispute whether there is one exposure at issue (the one that the officers saw) or multiple. Aplee. Br. at 23–24; Aplt. Reply Br. at 3–5. It does not matter that there may have been other exposures, because the one is sufficient to convict here.

1926), for the proposition that inadvertent exposure cannot support his conviction. Aplt. Br. 17, 19. But the facts in that case are completely distinguishable: the defendant was observed taking a bath in his home by a neighbor looking through the window from 40 to 50 feet away. Id.

B. Special Condition

Mr. Griffin objected to a special condition of supervised release that prohibited him from viewing, purchasing, or possessing "any form of pornography depicting sexually explicit conduct as defined in 18 U.S.C. [§] 2256(2), unless approved for treatment purposes, or frequent any place where such material is the primary product for sale or entertainment is available." 1 R. 51. Such condition must be "reasonably related" to the § 3553(a) sentencing factors and involve no greater deprivation of liberty than necessary. 18 U.S.C. § 3583(d)(1)–(2).

Mr. Griffin challenges the condition in two ways: (1) the condition is unsupported by the § 3583(d) factors, and (2) the district court failed to make particularized findings as required by United States v. Englehart, 22 F.4th 1197, 1211 (10th Cir. 2022). Aplt. Br. at 19–27. Because Mr. Griffin did not specifically object on the second ground, our review would be for plain error, however, at oral argument the government indicated that it would not seek to impose the condition on any remand.

The conviction and sentence are **AFFIRMED** in all respects except for the special condition of supervised release regarding pornography which is **VACATED.**

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge